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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. HOWARD NED McMONIGAL III, Appellant.	)	2 CA-CR 2009-0099 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20073959

Honorable Gus Aragon, Judge
Honorable Jane L. Eikleberry, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

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B R A M M E R, Judge.

¶1 Howard Ned McMonigal III appeals from his convictions and sentences for one count of illegally conducting an enterprise, three counts of theft, one count of possessing a motor vehicle with an altered vehicle identification number, five counts of kidnapping, three counts of sexual assault, one count of aggravated assault, and one count of possession of methamphetamine. He argues: (1) the prosecutor engaged in improper closing argument amounting to misconduct; (2) the state failed to disclose timely a victim's statements; (3) the trial court erred in admitting the contents of a note McMonigal's codefendant passed to him during trial; (4) the court erred in precluding him from interviewing a victim; and (5) the court erred in admitting evidence of events McMonigal asserts were "other bad acts." We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining McMonigal's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). McMonigal and his codefendant brother, Ignacio Rimer, managed an extensive illegal enterprise involving trafficking in methamphetamine and stolen cars, as well as prostitution. Relevant to this appeal, he used several women to perform various duties as a part of his operation and, on several occasions, used threats, physical abuse, and rape as discipline when they did not comply with his demands. Specifically, he kidnapped, assaulted, and raped M., kidnapped and raped F. on two occasions, and kidnapped W. and L.

¶3 After a twenty-three day trial, McMonigal was convicted of the charges previously described. He was sentenced to concurrent and consecutive, presumptive, enhanced prison terms totaling 128.75 years. This appeal followed.

Discussion

Prosecutorial Misconduct: Closing Argument

¶4 M. testified she stole cars and sold them to McMonigal. In September 2007, she had stolen a Nissan Xterra and taken it to McMonigal's trailer. McMonigal told her someone would come for the vehicle that evening and she should return with it later. At about 2:00 a.m. on the following morning, M. left her home, driving the Xterra, intending to return to McMonigal's trailer. After driving a short distance, she saw McMonigal, Rimer, and several other men standing on a corner near a stop sign. McMonigal, armed with a shotgun, ordered M. to get in the back seat of the Xterra. He drove M. and the others back to his trailer.

¶5 There, McMonigal took M. to his office and ordered her to disrobe. McMonigal "tased" M., then he and Rimer raped her. McMonigal and Rimer left M. in the office without her clothes. Several hours later, McMonigal's brother, J., helped M. escape through a window in the office. Although photographs taken in 2008 showed bars and a screen covering the window, M. testified that the window did not have a screen and that J. "[p]ulled [the bars] away from the trailer so that [she] had enough space to crawl through." M. testified she had weighed ninety-eight pounds when she escaped.

¶6 Referring to the 2008 photographs, McMonigal argued in closing that J. could not have pulled the bars away from the window and that paint on the screen indicated it had covered the window at the time of M.'s escape. McMonigal's mother, B., had purchased the trailer in 2005. She testified she had painted the outside of the trailer when she bought it and, in doing so, inadvertently had splashed some paint on the bars and window screen. Thus, McMonigal argued M.'s testimony was not credible because the screen and bars would have prevented her escape through the window.

¶7 The prosecutor, referring to the same photographs, stated in rebuttal that "the bars are not flush to the window, they give. Even [M.], thin, would squeeze out of those bars, firmly secured." He argued that an unpainted border around the bars suggested they had been moved since having been painted. He also argued there was white paint inside the screen, suggesting it had not been in place when B. had painted the trailer.

¶8 Although McMonigal did not object to the prosecutor's argument, he moved for a new trial based on it, asserting the prosecutor had committed misconduct because his statement that the bars "give" was unsupported by the evidence and the prosecutor improperly had suggested someone had "tampered" with the window. The trial court denied the motion. McMonigal asserts this was error, contending the prosecutor's statements were unsupported by the evidence.[1]

[1]We summarily reject McMonigal's argument that the prosecutor's statements constituted improper vouching. Improper vouching occurs when a prosecutor "places the

¶9 A prosecutor commits misconduct by "'call[ing] to the attention of the jurors matters that they would not be justified in considering in determining their verdict.'" *State v. Jones*, 197 Ariz. 290, ¶ 37, 4 P.3d 345, 360 (2000), *quoting State v. Hansen*, 156 Ariz. 291, 296-97, 751 P.2d 951, 956-57 (1988). For a prosecutor's improper argument to warrant reversal, the defendant must demonstrate that it "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *see* U.S. Const. amend. XIV, § 1; Ariz. Const. art. II, § 4. "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial . . . .'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). "A trial court's ruling on a motion for new trial based upon prosecutorial misconduct will not be reversed absent abuse of discretion." *State v. Anaya*, 170 Ariz. 436, 441, 825 P.2d 961, 966 (App. 1991).

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prestige of the government behind its witness" or "suggests that information not presented to the jury supports the witness's testimony." *State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989). The prosecutor here did neither; at most, he made statements unsupported by the evidence, which arguably constituted misconduct but not improper vouching.

¶10 Insofar as McMonigal argues that nothing in the photographs alone permits the inference that the bottom of the bars could be pulled away from the window as M. described, we agree. But we do not agree the prosecutor's statement that the bars "give" was misconduct warranting a new trial. First, before stating the bars "give," the prosecutor described the bars as not being "flush" with the window, then immediately stated M. could squeeze through the "firmly secured" bars. Thus, it is not entirely clear that, by using the word "give," the prosecutor intended to suggest the photographs permitted an inference the bars could be bent or pulled away from the window. Read in context, it appears equally likely the prosecutor, albeit inartfully, used the word "give" in reference to the gap between the bottom of the bars and the window. But, even if the prosecutor meant to suggest the bars could be pulled away from the window, the state presented evidence McMonigal's brother did precisely that. Such evidence certainly would provide sufficient factual support for the prosecutor to argue in good faith that the bars had "give" to them. The statement therefore would not qualify as the kind of intentionally improper act that constitutes prosecutorial misconduct. *See Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27.

¶11 Second, even if the statement was improper argument, we see no likelihood this isolated statement "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d at 1191, *quoting Donnelly*, 416 U.S. at 643. The jury was instructed properly that the attorneys'

statements were not evidence, and we presume it followed that instruction. *See State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006).

¶12 Finally, we find no merit in McMonigal's argument that the prosecutor improperly suggested the bars had been "tampered with" by someone "[o]n behalf of the defense . . . to show that [M.] could not have possibly squeezed between the bars and the window frame." The prosecutor argued the photographs permitted the jury to conclude the bars had been moved or altered after B. had painted them because they showed paint missing from around the bolts connecting the bars to the trailer. He additionally suggested the screen depicted in the photographs had been added after B. had painted the trailer because there was no paint on the screen. The photographs support these inferences, and the prosecutor in no way suggested these changes had been made at the behest of the defense to discredit M.'s testimony. Thus, for the reasons stated, the trial court did not abuse its discretion in rejecting McMonigal's misconduct argument and denying his motion for a new trial.[2]

Disclosure of Victim's Statement

¶13 McMonigal next takes issue with the circumstances surrounding the disclosure of a pretrial meeting between the state and L. In April 2008, L. was interviewed by defense investigators. On December 1, 2008, the day before

[2]Because we find no error, we need not address the state's argument that McMonigal has forfeited all but fundamental, prejudicial error by failing to object during the prosecutor's closing argument and raising this issue for the first time in his motion for a new trial. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

McMonigal's trial began, the state met with L. to review her previous statements and clarify her testimony. McMonigal learned of this meeting on December 4 and requested that the state disclose any notes that had been taken. Because the meeting was not recorded or transcribed, the state disclosed a paralegal's notes of the meeting to McMonigal the next day. The disclosure came just twenty minutes before opening statements, and McMonigal's counsel did not read it.

¶14 The following day, McMonigal moved to preclude L. from testifying and, in the alternative, moved that L. be ordered to submit to a second interview if she were to be permitted to testify. McMonigal claimed L.'s most recent statements, as reflected in the notes the state had disclosed, were inconsistent with her previous statements to McMonigal's investigators. The trial court heard argument on the motion the next morning and noted to Rimer's counsel, who joined in McMonigal's motion, that it was "highly unlikely" the court would preclude L. from testifying. Nonetheless, the court suggested the state should have disclosed L.'s possibly inconsistent statements more than twenty minutes before opening statements. It thus ordered as "a sanction" that the state disclose a more detailed summary of its meeting with L. In so ordering, it also implicitly denied McMonigal's request to re-interview L.

¶15 As ordered, the state provided a detailed summary of its meeting with L. to McMonigal the next day. Over a week later, McMonigal renewed his motion to interview L., arguing she was not a "victim" under the Victim's Bill of Rights because she was in federal custody and therefore lacked the right to refuse an interview. The trial

court declined to stop the proceedings to permit McMonigal to interview L. and decided to "hold the issue in abeyance pending [L.'s] ultimate detention status." The following day, L. was still in custody, but the court again denied the defense's request to interview her "regardless of whether she is in custody or not." The court reasoned that defense investigators already had interviewed L., that the defense had received summaries of the state's interview, and that in any event the defense "[n]ormally . . . wouldn't even get one interview [with L.] under Rule 39."

¶16 As best we understand his argument, McMonigal is asserting on appeal that the state's "tactic" in disclosing L.'s statements twenty minutes before opening statements "was but another example of prosecutorial misconduct, in violation of the mandatory disclosure in Rule 15.1[, Ariz. R. Crim. P.]." He contends the timing of the disclosure "interfered with [his] right to present a defense, denied him his constitutional right to confrontation[,] and denied him a fair determination of his guilt or innocence." Because McMonigal did not assert below that the state's allegedly untimely disclosure constituted prosecutorial misconduct, we review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶17 But the state's allegedly untimely disclosure of L.'s statements does not fall within the type of intentional impropriety protected against by the doctrine of prosecutorial misconduct. *See Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d at 426-27. The disclosure did nothing to "'call to the attention of the jurors matters that they would not be justified in considering in determining their verdict.'" *Jones*, 197 Ariz. 290, ¶ 37, 4

P.3d at 360, *quoting Hansen*, 156 Ariz. at 296-97, 751 P.2d at 956-57. Accordingly, we find no error, fundamental or otherwise.

¶18 McMonigal further asserts the trial court erred in denying his request to re-interview L. But he does not specify to which request he refers. With regard to his initial motion, his contention the court erred in denying his request to re-interview L. is resolved by Arizona's Victim's Bill of Rights. The Victim's Bill of Rights provides that "a victim of crime has a right . . . [t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant." Ariz. Const. art. II, § 2.1(A)(5). A "victim" is defined as "a person against whom the criminal offense has been committed . . . except if the person is in custody for an offense." Ariz. Const. art. II, § 2.1(A)(12)(C); *see* A.R.S. § 13-4401(19). L. apparently was not in custody at the time of McMonigal's first motion, and she was a person against whom a criminal offense alleged in the indictment had been committed. Thus, the court did not abuse its discretion in implicitly denying that motion to re-interview L. *See State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996) (trial court's decision regarding discovery sanctions reviewed for abuse of discretion).

¶19 With regard to his renewed motion to re-interview L., McMonigal provides no analysis addressing whether the trial court erred in denying his request to re-interview L. once she was in custody and, arguably, no longer entitled to the protections of the Victim's Bill of Rights. Indeed, he fails to mention the Victim's Bill of Rights at all. He

therefore has waived the claim. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004).

Admission of Codefendant's Note

¶20 McMonigal next asserts the trial court erred in admitting a letter that Rimer had passed to him during trial. Before McMonigal took the stand for the remainder of his cross-examination, Rimer passed a letter to him at counsel's table through McMonigal's counsel. McMonigal read the letter and gave it to his counsel, who tore it into pieces. His counsel then gave the letter to McMonigal's investigator. A sheriff's deputy intercepted the letter, and another deputy taped it back together.

¶21 The letter stated, inter alia, that "your story gots [sic] to be better than any one else," and "if you feel it's a tricky question you don't remember you were 'high.'" The trial court reviewed the letter in camera and found it to be an attempt by Rimer to coach McMonigal on his testimony. The court concluded, over objection, that the note was not hearsay because there was evidence from which the jury could conclude "there was an ongoing conspiracy to further the interest of the enterprise in question, up to and including [the] letter." *See* Ariz. R. Evid. 801(d)(2)(E). It thus admitted the letter in evidence.

¶22 McMonigal contends the trial court abused its discretion in admitting the letter, which he asserts was hearsay because "the alleged conspiracy ended upon the arrest of the defendants." "We will not disturb a trial court's determination on the

admissibility and relevance of evidence absent an abuse of discretion." *State v. Jeffrey*, 203 Ariz. 111, ¶ 13, 50 P.3d 861, 864 (App. 2002).

¶23 Inadmissible hearsay is "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). Non-hearsay includes "a statement by a coconspirator of a party during the course and furtherance of the conspiracy." Ariz. R. Evid. 801(d)(2)(E).

¶24 The letter here was not introduced to prove the truth of the matters it contained. *See* Ariz. R. Evid. 801(c). Rather, it was introduced to demonstrate that Rimer had attempted to influence McMonigal's testimony. Thus, it was not hearsay. Contrary to McMonigal's assertion, we need not address whether the alleged conspiracy was ongoing when Rimer wrote the letter. We must uphold a trial court's correct ruling for any reason supported by the record. *See State v. Cañez*, 202 Ariz. 133, ¶ 51, 42 P.3d 564, 582 (2002). The trial court did not abuse its discretion in concluding the letter was not inadmissible hearsay.

Interview of W.

¶25 McMonigal also asserts the trial court erred when it did not permit him a pretrial interview of W.[3] As best we understand his argument, McMonigal contends W.

[3]In a footnote McMonigal asserts the trial court abused its discretion "for the same reasons" in denying him an interview with M. This constitutes insufficient argument, and he thus has waived the claim. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Miller*, 186

was not entitled to the protections of the Victim's Bill of Rights because she was not a victim with regard to one count in the indictment and because she was "an alleged car thief, drug trafficker and human smuggler." He further asserts his inability to interview W. before trial deprived him of his right to confrontation under the Sixth Amendment.

¶26 In May 2008, Rimer's counsel moved to take W.'s deposition. Implicitly denying this motion, the trial court ordered the state to provide copies of W.'s statements to the clerk of the court. Although McMonigal states he "believe[s] [his counsel] joined in the motion," he does not cite the record to support this assertion. If McMonigal had joined in Rimer's motion, we would review the trial court's order denying the deposition for an abuse of discretion. *See* Ariz. R. Crim. P. 15.3(a) ("[T]he court may in its discretion order the examination of any person . . . ."); *Rogers v. Fenton*, 115 Ariz. 217, 218, 564 P.2d 906, 907 (App. 1977). If McMonigal failed to join in Rimer's motion, we would review only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶27 Regardless of our standard of review, however, it is plain the trial court did not err. As already noted, the Victim's Bill of Rights defines a victim as "a person against whom the criminal offense has been committed . . . ." Ariz. Const. art. II, § 2.1(A)(12)(C); *see* A.R.S. § 13-4401(19). Individuals who are "alleged car thie[ves], drug trafficker[s] [or] human smuggler[s]" are not excepted from this definition.

Ariz. 314, 323, 921 P.2d 1151, 1160 (1996) (appellant waived argument made in footnote). We do not address it.

¶28 In addition, a victim "shall not" be compelled to be deposed or interviewed "on any matter, including any charged criminal offense . . . filed in the same indictment or information." A.R.S. § 13-4433(A). Thus, although W. was not a victim as to some counts in the indictment, because she was a victim with regard to others, she had an absolute right to refuse an interview. *See id.*; *see also State v. Roscoe*, 185 Ariz. 68, 74, 912 P.2d 1297, 1303 (1996) ("[T]he victim's right to decline an interview has been considered absolute."). The trial court had no authority to order that she submit to one. *Day v. Superior Court*, 170 Ariz. 215, 217, 823 P.2d 82, 84 (App. 1991) ("The Victim's Bill of Rights precludes the trial court from ordering the deposition of a victim who has indicated an unwillingness to be interviewed.").

¶29 McMonigal last contends that because he was denied an interview of W. before trial, he was deprived of his right to confrontation under the Sixth Amendment. The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." This guarantee bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). Here, W. appeared at trial and McMonigal cross-examined her. Thus, although McMonigal was denied the opportunity to interview W. before trial, he was not thereby deprived of his right to confront her under the Sixth Amendment.

Evidence of Prior Acts

¶30 Last, McMonigal argues the trial court abused its discretion by failing to conduct a hearing, pursuant to his motion in limine, to determine whether evidence that McMonigal had "s[old] unspecified women to drug dealers" was admissible under Rule 404(b), Ariz. R. Evid. L. testified at trial that McMonigal had arranged for her to have sex with several men in exchange for drugs and that he similarly had offered women to his drug suppliers in exchange for drugs or money.

¶31 Rule 404(b) provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith" but may be admitted to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Although the jury ultimately must determine whether the other act has been proved, "before admitting evidence of prior bad acts, trial judges must find that there is clear and convincing proof both as to the commission of the other bad act and that the defendant committed the act." *State v. Terrazas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997). That determination may, but need not, be made after an evidentiary hearing. *See State v. LeBrun*, 222 Ariz. 183, ¶ 10, 213 P.3d 332, 335 (App. 2009).

¶32 The trial court ruled evidence of such acts would support the charge McMonigal had conducted a criminal enterprise and therefore would be admissible without regard to Rule 404(b). *See* A.R.S. §§ 13-2312(B); 13-2301(D)(4). McMonigal asserts this determination was "clear error and an abuse of discretion" but does not

develop this argument in any meaningful way. He therefore has waived this argument on appeal, and we do not address it further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Dann*, 205 Ariz. 557, n.8, 74 P.3d 231, 244 n.8 (2003) (failure to develop argument waives argument on appeal).

Disposition

¶33 For the foregoing reasons, we affirm McMonigal's convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge